

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 07-cr-00491-JF
 :
 ALEXIS AYALA-MENDEZ :

The other document filed on December 28, 2009, is entitled "Defendant's Motion for Re-sentencing, Under

Extraordinary Circumstances, to File a Notice of Appeal.” In that document, defendant asserts that, after being sentenced, he instructed his then-counsel to file a notice of appeal, but his counsel failed to do so. He wishes to be re-sentenced, so as to be able to file a timely notice of appeal.

In response to these filings, the government points out, quite correctly, that if the Bureau of Prisons has not properly calculated the commencement of his sentence, defendant must seek relief in the jurisdiction in which he is now in custody (the Middle District of Pennsylvania) rather than in this Court. The government also suggests that defendant’s contention that his trial counsel was ineffective for failing to file a notice of appeal should be asserted by a motion under 28 U.S.C. § 2255; that it is now much too late for any such application; that the alleged dereliction on the part of his trial counsel is insufficient to justify equitable tolling; and, that both of the defendant’s applications are untimely and should be rejected.

My conclusions are as follows: (1) if the Bureau of Prisons has not properly calculated the start-date of defendant’s custody, defendant would eventually be in a position to assert that he is being held in custody in violation of his constitutional rights, and is entitled to release upon a writ of habeas corpus. Any such relief should be obtained in the jurisdiction where he is then confined. The present application

for relief is premature. On the other hand, it is reasonable to suppose that, if a mistake is being made by the Bureau of Prisons, that mistake will be corrected upon notification by the defendant that the error has occurred. The present application should be dismissed without prejudice to later proceedings if they become necessary.

With respect to the request for re-sentencing so that he can file a timely appeal, I conclude that this is relief which would be available only under 28 U.S.C. § 2255, and that the defendant waited too long to make such an application.

An Order follows.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.

